IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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J U D G M E N T

1. S.B. CIVIL REVISION PETITION NO. 128/2004-RAJ KUMAR VS.ARJUNLAL AGIANST THE ORDER DATED 16.12.2003 PASSED BY SHRI NATHU LAL MEENA, RHJS, LEARNED DISTRICT JUDGE, RAJSAMAND IN CIVIL EXECUTION CASE NO.5/2002.

1. S.B. CIVIL MISC. APPLICATION NO.15/2004 IN S.B. CIVIL FIRST APPEAL NO.297/2001-RAJ KUMAR VS. ARJUN LAL (DECIDED ON 9.11.2001)

DATE OF JUDGMENT : 3rd January, 2005

PRESENT

HON'BLE MR. JUSTICE PRAKASH TATIA

REPORTABLE

Mr.Manish Shishodia, for the petitioner/appellant.
Mr.M.C.Bhoot, for the respondent.

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BY THE COURT:

Heard learned counsel for the parties on application submitted by the appellant-applicant for seeking clarification of the order dated 9th Nov., 2001.

The brief facts of the case are that a suit for eviction was filed by the plaintiff-respondent-non - applicant against the appellant-applicant-defendant with the allegation that the suit property was let out to the

defendant on a rent of Rs.2,701/- per month. The plaintiff claimed the arrears of rent of 18 months amounting to Rs.48,618/-, but since the defendant-tenant already gave a deposit of Rs.20,000/- to the plaintiff, therefore, the suit for recovery of arrears of rent was for Rs.28,658/-. According to plaintiff, the tenancy was terminated by the plaintiff from 19th March, 1996. Therefore, the plaintiff claimed damages for use and occupation @ Rs.5,000/- per month.

The trial court framed the separate issues for the rent of 18 months and for damages for use and occupation @ Rs.5,000/- per month as claimed by the plaintiff. The trial court decided both the issues together and decreed the suit of the plaintiff for rent of Rs.28,618/- as arrears of rent and further decreed the suit of the plaintiff at the same rate of rent on which the premises was let out to the defendant, i.e., @ Rs. 2,701/- per month from 19th March, 1996 till the possession is delivered to the plaintiff by the defendant. This amount from 19th March, 1996 has been described as damages for use and occupation in stead of rent.

Since the trial court also passed the decree for eviction alongwith the above money decree, therefore, plaintiff preferred the regular first appeal before this Court. In the appeal, on the first date of hearing, i.e.,

on 9th Nov., 2001 both the parties gave their consent for deciding the appeal. This court passed the following order: -

> "With the consent of both the parties, this appeal is decided as under:
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> In this appeal the plaintiff waived his right to recover the arrears of rent on the condition that defendant will handover the vacant possession of the premises in dispute to the plaintiff within three weeks and in case the plaintiff refuses to take possession of th property or is not available to take possession of the property in dispute then the defendant will be free to handover the possession by applying before the trial court by moving the application before the trial court to deliver the possession to the plaintiff.
>
> The learned counsel for the appellant submit that the appellant under take to handover the possession of the property to the respondent-plaintiff within aforesaid period.
>
> In view of the above submission of both the counsel nothing survives in this appeal.
>
> Hence, the this appeal is disposed of and the decree for recovery of the arrears of rent against the defendant-appellant is set aside as the plaintiff relinquished his right to recover arrears of rent subject to the condition mentioned above. The parties will bar their own costs."

It is said by the defendant that he offered the keys of the suit shop to the plaintiff but he did not accept the key, therefore, the defendant-appellant submitted the key before the trial court so that same may be handed over to the plaintiff. However, there is no dispute with respect to the fact that possession of the suit premises has already been delivered to the plaintiff by the defendant in

pursuance of the decision given in the first appeal dated 9th Nov., 2001.

The decree-holder not satisfied with the delivery of the possession of the suit premises submitted execution petition before the trial court and prayed that the plaintiff is entitled for the amount of damages for use and occupation as decreed by the trial court in its decree dated 9th August, 2001. The executing Court issued a attachment warrant for recovery of the amount claimed by the plaintiff-respondent. The appellant-judgment-debtor submitted an application before the executing court on 8th August, 2002 raising objection against the execution. According to appellant-defendant-tenant the plaintiff waived his right to recover any amount under the decree and, therefore, the defendant agreed only to surrender the possession of the suit premises to the plaintiff instead of contesting the appeal and in view of the above, nothing is due in the appellant-defendant-tenant. So far as arrears of rent or mesne profit are concerned, the executing court vide order dated 16th Dec., 2003 interpreted the order of this court by saying that in the High Court plaintiff agreed to waive only arrears of rent and not the mesne profit. Therefore, the possession warrant cannot be withdrawn. The trial court also dismissed the application of the appellant-plaintiff filed in the execution petition.

In the backdrop of these facts, the appellant-tenant submitted a revision petition being S.B.Civil Revision Petition No.128/2004 and challenged the order of the executing court dated 16th Dec., 2003 by which the petitioner-appellant's objection petition was dismissed by the executing court and appellant-defendant-tenant submitted an application for clarification in the order dated 9th Nov., 2001 passed in S.B.Civil First Appeal No.297/2001, which has been registered as S.B.Civil Misc. Application No.15/2004.

According to learned counsel for the appellant - defendant-tenant, the appellant challenged the judgment and decree of the first appellate court and in the first appeal, the plaintiff agreed to waive his monetary benefits under the decree on the condition that appellant will hand over possession of the property to the plaintiff within three weeks only. It is submitted that the intention of the parties can be gathered from the facts and surrounding circumstances if it was not so clear from the mere reading of the words of the order dated 9th Nov., 2001. According to learned counsel for the appellant, the period for vacating the premises is three weeks. The court has already observed that in view of the plaintiff's acceptance to forego the decretal amount, nothing survives in this appeal inspite of the fact that there is no mention in the order that appellant either withdrawing his appeal or is

not pressing his challenge to decree for mesne profit. The order was dictated in the presence of counsel for both the parties, who not only understood but made clear to the court, after it there will be no claim of anybody against other. It is submitted that the rent and the damages for use and occupation are one and the same thing in a matter where there is a question of monetary claim in the forum of rent or mesne profit, in a suit for eviction against the tenant. The trial court decreed the suit of the plaintiff describing the rent for one period, i.e., upto the period of termination of tenancy and, thereafter mesne profit because of the reason that according to the trial court after termination of the tenancy, the decree for mesne profit can be passed and not for the rent.

Learned counsel for the respondent submitted that the application for correction of the order is not maintainable because of the reason that the order has already been interpreted by the executing court by judicial order and there is no jurisdictional error in the order passed by the executing court interpreting the order of this court wherein the executing court held that the rent and the mesne profit are separate and distinct components and in view of the above finding, it is clear that the plaintiff waived his only rent amount and not the mesne profit. It is also submitted that it was the duty of the appellant to point out before this Court on 9th Nov., 2001 distinctly

whether he is surrendering the possession of the property on plaintiff's foregoing his right to recover rent as well as mesne profit. It is also submitted that in the judgment of the trial court it is clearly mentioned with two distinct components then what has been foregone by the plaintiff can be read only which has been specifically recorded by the court.

According to learned counsel for the respondent, the application for clarification of the order itself is not maintainable because of the reason that there is no ambiguity in the order and the plaintiff knowing it well what he is foregoing, consciously gave statement before this court that he is foregoing only rent portion and not the mesne profit portion and this fact is recorded in the order itself.

Learned counsel for the respondent further submits that there is no reason for interference in the order dated 16th Dec., 2004 passed by the executing court because the court has not committed any jurisdictional error.

I considered the submissions of learned counsel for both the parties. The facts are required to be recapitulated again. The tenancy was created only in the year 1994. The suit was decreed in the year 2001. The regular first appeal was preferred by the appellant against

the judgment and decree of the trial court and on the first date when case was listed for admission, both the parties submitted that the appellant-defendant will hand over the possession of the suit premises to the plaintiff only within three weeks. These facts are very much relevant because this court accepted that in view of the submissions of both the counsels, nothing survives in this appeal. If it is accepted that the plaintiff only relinquished his rent amount because only word 'rent' has been mentioned in the order dated 9.11.2004 then there is no mention in the order that defendant appellant is withdrawing his appeal or any of relief claimed in appeal. This court after satisfaction that the entire matter stand settled, therefore ordered in the presence of both the learned counsel for the parties that.- "In view of the above submission of both the counsels nothing survives in this appeal". None of the learned advocate objected against this part of the order. Therefore, it cannot be accepted that the plaintiff-respondent relinquished his claim of rent only. If it is accepted that only words of the order be read then there is no mention in the order that appellant is withdrawing his appeal or withdrawing even any of his relief claimed in the appeal. In that situation, entire appeal could not have been dismissed by the court and it could not have been ordered that nothing survives in appeal.

If it was a mistaken belief of the appellant that he will get benefit of amount, which is decreed against the appellant and he agreed for surrendering of the premises, but the plaintiff was under impression that he will get the possession of the property within three weeks on foregoing only Rs.28,618/- and the plaintiff will get money of more than Rs.2,40,784/- then it appears that both the parties proceeded under wrong assumption of fact. If it is so then the order dated 9th Nov., 2001 itself might have been challenged on the ground that both the parties proceeded on wrong assumption of fact.

However, so far as this Court is concerned, the court is of the firm view that the intention of the parties on 9th Nov., 2001 was very much clear and the plaintiff waived his rent including the amount termed as damages for the use and occupation on appellant's surrendering possession of the premises in such a short period of three weeks only, therefore this court in the presence of parties, passed the brief order and in the presence of both the learned counsel, without even recording that appellant is not pressing appeal or any part of it, then nothing survives in appeal.

Otherwise also a bare perusal of the provisions which governs the suit filed in the provisions of the Rent Control Act, i.e., Rajasthan Premises (Control of Rent and

Eviction) Act, 1950, it is clear that word 'Tenant' has been defined in Section 3 sub-clause (7) of the Act of 1950, which says that tenant means the person by whom or whom account rent is payable for any premises to his landlord and it also includes the person who is continuing in its possession after the termination of his tenancy, otherwise than by a decree for eviction passed under the provisions of the Act. Not only this, but by virtue of this definition, the tenancy continues even after the death of the tenant, but some restriction has been provided under sub-clause (b) of clause (7) of Section 3 of the Act of 1950. In every suit for recovery of arrears of rent where default is ground for eviction, the court is required to determine the rent under Section 13(3) of the Act. Sub-section (4) provides that the tenant shall deposit the rent during the pendency of the suit. In the entire Act of 1950, there is no provision, which provides that the tenant after the termination of the tenancy shall not be tenant rather the definition makes all the persons tenants, who are liable to pay the rent to the landlord and specifically make the persons tenant, who continued to be in possession after termination of tenancy. As stated above, Section 13 (3) and (4) cast duty upon the court to determine the rent and not mesne profit or damages for use and occupation and statutory duty is cast upon the person in occupation whose tenancy has been terminated by the landlord to pay the rent and not the mesne profit.

In view of the above, it is absolutely clear that there is no scope for saying that since the court has used the word mesne profit somewhere or damages for use and occupation somewhere distinctly, therefore, two are different.

Not only this, but where the Rent Control Act of 1950 is applicable, there cannot arise any question of claiming damages for use and occupation from the tenant because it will go just contrary to the express provisions made in the Rent Control Act. One of the reasons is that tenant is required to pay the rent to the landlord during the entire period of suit and, in view of the latest judgment of the Hon'ble Supreme Court, even during the pendency of the appeal under the provisions of Section 13(4) of the Act of 1950. Further reason is that the damages for use and occupation may be different than the rent and may be different from the standard rent, but the Rent Act prohibits recovery of any amount in excess of rent or/and standard rent, which is clear from Section 8 of the Act of 1950.

In view of the above reasons, the trial court though used two words, rent and the damages for use and occupation, but it certainly means only rent.

In view of the above discussion when the facts are

apparently clear if examined in the light of the facts of the case and by proper reading of the law on the point then on the point of law also, appellant-applicant succeeds.

So far as objection of learned counsel for the respondent that application for clarification is not maintainable, deserves to be rejected summarily because of the simple reason that the plaintiff-respondent intentionally after relinquishing his claim compelled executing court to misconstrue the order and, therefore, appellant-defendant was left with no other option but to move application before this court. I also not found any force in the submission of learned counsel for the respondent that the appellant should have moved an application for review of the order. Any application for review of the order of this court dated 9th Nov., 2001 would have been absolutely misconceived in view of the fact that the order itself requires no clarification, but since dispute has been raised by the plaintiff by launching execution petition for mense profit the petitioner was compelled to file this application.

In view of the above, the application of the appellant is allowed and it is made clear that in view of the order of this court dated 9th Nov., 2001 the plaintiff is entitled only for the cost of the suit as decreed by the trial court

and nothing more on account of arrears of rent or mesne profit are concerned.

This court constrained to observe that the plaintiff has tried to take benefit of the situation created by the plaintiff himself and he obtained the order of dismissal of the appeal of the appellant and took the possession of the suit premises and still raised a false claim, therefore, he is liable to pay a cost of Rs.5,000/- to the appellant-applicant. In view of the fact that the appellant - applicant's application is allowed with cost of Rs.5,000/-, the revision petition of the petitioner challenging the order dated 16th Dec, 2003 has become infructuous and it may be observed that the execution proceeding can proceed only for recovery of the cost of the suit.

In view of the above discussion, the S.B.Civil Misc. Application NO.15/2004 is allowed as mentioned above and the S.B.Civil Revision Petition No.128/2004 is dismissed. The respondent shall deposit the cost within a period of six weeks from today in the executing court. However, the decree-holder-respondent shall be entitled to adjust the cost of the suit while depositing the cost.

(PRAKASH TATIA), J.

c.p.goyal/-